No. 28.

IN THE

United States Circuit Court of Appeals.

NINTH CIRCUIT.

April Term, 1892.

WM. H. LAKIN, Plaintiff in Error,

vs.

J. H. ROBERTS et al., Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR.

H. L. GEAR,

Attorney for Plaintiff in Error.

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WILLIAM H. LAKIN,
Plaintiff in Error,

vs.

J. H. ROBERTS, *et al.*,
Defendants in Error.

BRIEF OF PLAINTIFF IN ERROR.

1. Statement of the Case.

This was an action of ejectment brought by the plaintiff in error against the defendants in error, to eject them as trespassers from a patented mining claim, a portion of which is described in the complaint (original record, pp. 2 to 4), and to which plaintiff deraigns title from the original patentee, the Mammoth Gold Mining Company, through the Sierra Buttes Co., its grantee (pp. 32, 43, 58.) The answer denies plaintiff's title, and pleads adverse possession, and avers that defendants are in possession of lots in the town of Johnsville, situated on the land claimed by plaintiff (pp. 22 to 26.)

The question of adverse possession is not raised by the facts appearing in the record. Plaintiff in error claims that his title has been admitted by tenancy of the defendants under plaintiff's grantor (p. 47). Defendants in error, on the other hand, though they have shown no paramount title in themselves, and have not connected themselves with any paramount title, claim that their mere possession of patented mineral lands, which are confessedly mineral (pp. 28, 46), a portion of which they occupy for the purpose of village lots, entitles them to assail collaterally the validity of the patent under which the plaintiff claims, on the grounds:

1st. That the patent, though granted upon an application and survey made under the Act of Congress of July 26th, 1866, having been granted since the adoption of the Revised Statutes, could not include more than three hundred feet on each side of the ledge; and,

2d. That they can show by *evidence aliunde* that the mining laws of the district did not warrant the grant of so much land as was patented.

Their position was sustained by Judge Hawley, who determined the case in the Circuit Court, and whose opinion appears in the record (pp. 69–83. The questions as to the tenancy and its effect upon

the defendants, and as to the propriety of, sustains their assault upon the validity of the mineral patent, involve the whole of the case to be decided by this Court.

The case was submitted for decision upon an agreed statement of facts, including exhibits, affidavits and documentary evidence, stipulated between the parties, subject to certain objections specified in the stipulation, upon which the Court passed in deciding the case (pp. 43 to 44, 63, 64). The record discloses the following state of facts:

In July, 1851, the Mammoth Company located 2,100 feet of a quartz ledge on Eureka Mountain in Jamison Mining District, Plumas County, Cal., without specifying in the notice of location any surface ground, but at the time of the location, located and recorded a claim of a tract of land on Jamison Creek, at the base of the mountain, claiming three hundred yards in length along the creek for mill purposes and timber for mining, and built a mill on it, run tunnels and constructed a wagon road and tramway from the tunnels to the mill across the present site of Johnsville, which is about 1,000 feet from the lode line described in the location and patent, and extends about 700 feet in width to within about 200 feet from the creek, which would make the present site of Johnsville within the

limits of the 900 feet in width claimed for mill site purposes along Jamision Creek on the side where the mill was built, between the ledge and the creek (p. 50), though there was no actual possession of the land on which the village of Johnsville is now situated, except the road leading across the same from the river to the mill (p. 49).

On November 4th, 1865, a northeasterly extension of the mine was located without additional claim of surface ground. The actual direction of the extension was obscured farther than has been indicated by the workings in the original ledge and the general direction of the foot wall (p. 51), which indicates an actual trend of the lode passing through the village of Johnsville (p. 46).

On August 26th, 1867, the then owners of the Mammoth Claim and extension, Thompson and McGee, had a survey made of the 4,100 feet of lode and 252 and 95–100 acres of ground, extending to and across Jamison Creek and including the original Mammoth Millsite Claim, on both sides of the creek, and the whole of the present site of Johnsville, no part of the village being then in existence. Monuments were then marked on the ground to indicate the boundaries, and the survey was made as the basis of an application for a patent, and was afterward approved by the Surveyor-

General as the final survey of the land for which the patent was issued. On August 30th, 1867, a diagram of the survey and notice of intention to apply for a patent was posted on the claim (p. 51). On September 7th, a notice of intention to apply for a patent for the Mammoth Quartz Claim was published in a newspaper, the notice describing the lode line of 4,100 feet, "and including the land between the lode and Jamison Creek for working purposes," which publication was continued for ninety days (p. 52).

On the 11th of September, 1867, application was made for a patent for the land included in the survey, under the Act of Congress of July 26, 1866, alleging that the applicants had occupied and improved the same in accordance with the local customs and rules of miners, and that they presented a diagram so extended as to conform to the rules of the mining district, etc. The Register of the Land Office made an order for publication of notice of the application for ninety days (p. 53). On Feb. 27th, 1877, the Register certified to due posting and publication of notice for ninety days, and that no adverse claim had been filed. On March 2d, 1877, the Surveyor-General made his final report of survey, approving the original preliminary survey attached thereto, which certified that on the

28th day of August, 1867, there were three tunnels on the claims; that there was a mill for reducing rock on Jamison Creek and plenty of timber near the mill for all purposes (p. 54). On the same day affidavits were filed in the Land Office showing that the Mammoth Gold Mining Company was the successor in interest of Thompson and McGee, and had had possession of all the surface ground included in the application since June, 1870, and had expended $50,000 in valuable improvements; that search had been made for mining rules and regulations but none were found and none were believed to be in existence, or to have been in existence for many years (p. 55).

On March 17th, 1877, a mineral entry was made by said company as the assignee and successor of Thompson and McGee, purporting to be "in pursuance of the Mining Act of Congress, approved July 26, 1866," and describing the land included in Thompson and McGee's survey and application for patent (p. 56). The patent fully identifies the entry and survey, but purports to be executed "in pursuance of the Revised Statutes of the United States," and recites that the entry was "in pursuance of said Revised Statute," and conveys the premises to the Mammoth Gold Mining Company (p. 57), in accordance with the descriptions in the

entry and survey (pp. 54, 56–7). The plaintiff claims under this patent, and the title to the premises in controversy depend upon its validity, and upon the right of the defendants to assail it.

For the purpose of showing under the stipulation, subject to plaintiff's objection, what were the mining rules and customs of miners in Jamison Mining District, defendants filed affidavits, the substance of which is set forth in the record, showing different statements by different persons as to the contents of the original rules adopted in 1851, which were destroyed by fire in 1862 (pp. 58–59); and that the plaintiff filed counter affidavits, showing that the rules never contained any limitation as to the amount of surface ground to be claimed, and that no rules were in existence at the time of the location of the extension in 1865 (pp. 60, 61). Defendants, to show the customs of miners, subject to the same objection, filed an abstract of the records of lode locations from 1856 to 1868, which disclosed no uniformity of custom as to the amount of lode claim or of surface ground located by different claimants, numbers of them claiming generally sufficient ground for working purposes, without mention of any distinct quantity of surface, and a few others specifying various widths of surface (pp. 61, 62).

The stipulation agreed, subject to plaintiff's objections to their irrelevance and materiality and incompetency, that the record of a claim by one John Banks and of conveyances from him to a portion of the defendants', might be shown as exhibits for defendants (p. 47).

The defendants filed as an exhibit a certified copy of a record of a claim by said Banks of twenty acres for building and agricultural purposes, recorded June 20th, 1876, but filed no exhibits showing any conveyance or conveyances from him to any person (p. 63). It is agreed that Johnsville has for ten years last past had a population of about 200 persons, and has been laid out in streets and lots and used as a center of business, and that a plat of it was surveyed in the summer of 1889, by A. W. Keddie, and filed with the County Recorder of Plumas County, a copy of which was appended to the answer (p. 45). This action was commenced the same year, December 15th, 1889 (p. 21). In 1883 a number of the defendants and their grantors paid rent to the Sierra Buttes Mining Company, the grantor of plaintiff, and the remainder of the defendants have since entered thereupon, either with the express or implied permission of the Sierra Buttes Company, with the understanding that it did not

object to occupation of lots while not interfering with its use and enjoyment of the patented premises (pp. 47, 48).

II. Specification of Errors Relied Upon.

1st. The Circuit Court erred in rendering judgment in favor of the defendants in error upon the findings, and in not rendering judgment in favor of the plaintiff thereupon.

2d. The decision of the Circuit Court is against law in allowing the mining patent under which plaintiff claims title to be collaterally assailed by the defendants in this action, and in holding that the patent is void as to any of the land occupied by said defendants, or as to any parts of the premises in the patent described, and that at the time this action was commenced plaintiff did not own and was not entitled to the possession of the land occupied by said defendants, and in deciding that, as to any of said defendants, said action should be dismissed, and in awarding judgment to any of them for their costs and disbursements.

3d. The Circuit Court erred in overruling the objection of plaintiff to proof of the mining rules of Jamison Mining District, and in admitting proof of the same for the purpose of assailing the patent under which plaintiffs claimed title.

The substance of the evidence thus erroneously admitted consisted of the affidavits of John S. Graham, J. D. Byers, George Woodward, Sol. Babb, John P. Hills and A. Jump, each stating in substance that the original mining rules adopted by the miners of Jamison Mining District were destroyed by fire in the year 1862; that rules in writing for said district were adopted at a meeting of miners in 1851, and that the affiant was familiar with said rules. The affidavit of John S. Graham states that the rules originally authorized each person to locate not to exceed thirty feet on a quartz ledge or lode, and not to exceed 250 feet on each side of said thirty feet of ledge located, and that the rules were subsequently changed so as to limit the location of a quartz claim to twenty feet along the ledge, including the dips, spurs and angles. The affidavit of J. D. Byers states that the size of quartz claims required by the laws adopted in 1851, was twenty feet to each man along the course of the ledge, including the dips, spurs and angles; that he could not remember the exact amount of surface ground authorized to be located on each side of a lode claim, but it is certain it did not exceed one hundred feet on each side of the lode or vein located. The affidavit of George Woodward states that said written rules, adopted in 1851, authorized each person to locate not to exceed thirty

feet along the line of the lode or ledge, with all of the dips, spurs and angles of the ledge, and to hold surface ground on each side of the ledge or vein not to exceed one hundred feet. The affidavit of Sol. Babb, states that the rules originally authorized each person to locate not to exceed thirty feet on a quartz ledge or lode, and not to exceed one hundred feet on each side of said thirty feet of ledge located, and were subsequently changed so as to limit the locator of a quartz claim to twenty feet along the ledge, including the dips, spurs and angles. The affidavit of John P. Hills. states that said written laws originally authorized each person to locate twenty feet along the lode or vein; that he did not remember definitely the amount of surface ground on each side of the lode which each claimant could hold; but it is certain that the rules did not authorize the location of more than one hundred feet on each side of the ledge, and knows of no change authorizing any greater amount of surface ground. The affidavit of A. Jump, states that in 1851 and 1852, he had in his possession a copy of the local rules and records of Jamison Mining District, and became well acquainted with them, and the said rules authorized each miner to locate not to exceed twenty feet on a quartz ledge or lode, including the dips and angles thereof. This last affidavit appears to have been prepared in blank

by some other person before the filling up of the same and signature thereof by said Alemby Jump, and the following words are erased therefrom, "and not to exceed feet on each side of said feet of ledge so located" (pp. 58, 59). The plaintiff objected to the consideration of these affidavits, on the ground that any proof of the mining rules of Jamison Mining District, adopted prior to 1867, was irrelevant, immaterial and incompetent. The Court overruled the objection, and admitted and considered said evidence in its decision, to which ruling plaintiff duly excepted (p. 63).

4th. The Circuit Court erred in overruling the objection of plaintiff to proof of the customs of miners in said Jamison Mining District, and in admitting said proof for the purpose of assailing the patent under which plaintiff claimed title. The full substance of the evidence in regard to said customs consists of a certified abstract of all lode locations made in Jamison Mining District, and recorded upon the records of Plumas County prior to 1868, filed as an exhibit for defendants to show the custom of miners as to the extent of vein and surface claimed by locators of ledges therein, showing that in the year 1856 two locations were recorded, one by three persons claiming 125 feet of the lode, with its dips, spurs, and angles, without

mention of surface, and the other by five persons claiming 275 feet "embracing all the dips and "angles of the ledges together with surface ground "necessary to work the ledge." In 1865 eight locations were recorded, the first four making no mention of surface ground and claiming 100 feet of ledge to each locator along the ledge, with its dips, spurs and angles. The other four were locations of 200 feet of ledge to each locator with one claim for discovery, claiming the ledge with all its dips, spurs, angles and branches to the width of 500 feet. In 1860 eight locations were recorded, one by fourteen claimants of 3,000 feet of ledge without mention of surface ground, the other seven being at the rate of 100 feet of vein to each locator, including all dips, spurs and angles of the ledge, four of them making no mention of surface, two others calling for "suf- "ficient ground on either side for fully developing "and working the same," one other containing the words "together with all necessary appurtenances thereto for working and developing the ledge," one calling simply for "appurtenances," and the remaining one of the eight containing the words "together with all appurtenances necessary for developing the ledge." In 1862 three locations were recorded, two of them by locators claiming at the rate of 100 feet each, and the third by eleven locators claiming 2,500 feet of ledge, all three locations

claiming all dips and angles of the ledge without mention of surface ground. In 1863 two locations were recorded, one by seven locators claiming 100 feet and all quartz lodes within 125 feet of the ledge "and sufficient ground upon each side thereof for the convenience of working the same; and one by thirty locators of 3,000 feet of ledge and all quartz veins within 125 feet, "also all the land wood and water within twenty rods of the said "ledge." In 1864 one location was recorded by fifteen persons of 2,000 feet of ledge, "with all dips, spurs and angles of the same" with no mention of surface ground. In 1865 six locations were recorded, three of them making no reference to surface ground, two claiming 200 feet, and one claiming 100 feet on each side of the ledge. Two of them claimed 100 feet of vein to each locator, and the other four claimed 200 feet of vein to each locator, one of these being the Mammoth Extension claim of 2,000 feet, located by James M. Thompson, John B. McGee and eight others. In 1866 two locations were recorded, one by five locators, claiming 1,200 feet of ledge, with all its dips, spurs and angles, without mention of surface ground, and the other by six locators claiming 200 feet each, with 150 feet of ground on each side of the ledge. This evidence was objected to by plaintiff as irrelevant, immaterial and incompetent. The Court overruled the

objection and admitted and considered said evidence in the decision of the cause, to which ruling plaintiff excepted.

5th. The Circuit Court erred in overruling the objections of plaintiff to the certified copy of the claim of John Banks, filed as an exhibit for defendants, which shows in substance that on the 20th of June, 1876, said John Banks recorded upon the records of Plumas County a notice of a claim of twenty acres of land "for building and agricultural purposes," and described as follows: "Commencing at a spruce pine tree on the west bank of Jamison Creek, on the N. E. line of the Mammoth Mill ground; thence along said line in a N. W. direction to the base of the mountain; thence in a N. E. course along the base of the mountain ninety yards; thence in a S. E. course by a large cedar and dead pine tree to the brow of said flat; thence up the brow of said flat to the place of beginning" (p. 63.) This evidence was objected to as irrelevant, incompetent and immaterial, and the Court overruled these objections, and admitted and considered said claim in the decision of the cause, to which ruling plaintiff duly excepted (p. 64.) No evidence appears in the record to identify the boundaries of this claim, or to show that this claim includes the land occupied by any of the defend-

ants, or that any portion of it was conveyed to any specified defendant.

6th. The plaintiff in error also assails the findings of fact as unsustained by the evidence in the following particulars:

a. Neither the evidence nor the agreed statement of facts justifies the finding or decision by the Court "that there was not at any time prior to " 1868, any law, usage or custom in force in Jami- " son Mining District authorizing the location or " occupancy of more than 100 feet of surface " ground on each side of the lode located " (p. 29); but the evidence and the agreed statement of facts show the contrary facts to be true (pp. 55, 60, 61, 62), and the said finding is conclusively contradicted by the records of the Land Office, which show that Thompson and McGee at the time of their application for a patent in 1867 had theretofore occupied and improved the premises applied for in accordance with the local rules, customs and rules of the miners in said district, and that there was then in controversy as to their claim to the whole of said premises, and that it was proved to the Land Department that there were no mining rules or customs in force precluding the occupancy of the whole thereof, or the application for a patent for the whole of said premises, or the granting of a patent for the same (pp. 53, 54, 55).

b. Neither the evidence nor the agreed statement of facts justifies the finding or decision of the Court that "no surface ground was claimed along the line of said Mammoth lode" (p. 290), or the implied finding or decision that no surface ground parallel to said lode was claimed by the locators thereof; but they show, on the contrary, that the locators of said Mammoth lode claimed and located a tract of land parallel with said lode and including Jamison Creek, for working purposes, about the time of the location of said lode, which claim included said creek and three hundred yards upon each side thereof within the limits of the patented premises, and that they built a mill and claimed and used lumber on said tract for working purposes (p. 50).

c. Neither the evidence nor the agreed statement of facts justifies the finding or decision that there was no possession of the land in controversy for mining purposes prior to the issuance of the patent (p. 30), but both of them show, on the contrary, that there was constructive possession of the whole thereof for said purposes before said patent was applied for (pp. 50, 51).

d. There is no evidence nor any agreed facts to justify the finding that there was a custom in force in Jamison Mining District from 1856 to 1868 to

record all notices of mining locations in the office of the County Recorder of Plumas County.

e. Neither the evidence nor the agreed statement of facts justifies the finding or decision that no other notices than these set out in the 4th finding of fact were posted and published in the proceeding to obtain said patent (p. 31); but show, on the contrary, that said proceedings were regularly conducted in respect to the posting and publication of all notices of the application for said patent (pp. 53, 54).

f. Neither the evidence nor the agreed statement of facts justifies the finding or decision that McGee and Thompson took no other or further steps to procure a patent for said claim (p. 31), but show, on the contrary, that they took all the steps necessary to forestall any opposition of any claimant to said premises or any part thereof (pp. 53, 54).

g. There is no evidence or agreed facts to justify the finding or decision that one John F. Banks on the 17th of June, 1876, entered upon and located twenty acres of land upon which the town of Johnsville is now situated (p. 32), or to justify the implied finding that said Banks was ever in possession or had the right of possession of any part of the said land, or of any part of the premises in controversy (pp. 47, 63).

h. There is no evidence or agreed fact to justify the finding or decision that any part of the claim of said Banks passed by mesne conveyances to any defendant or defendants residing in the town of Johnsville (pp. 32, 66).

i. Neither the evidence nor the agreed statement of facts justifies the finding or decision that plaintiff at the time the action was commenced was not the owner of nor entitled to the possession of the land occupied by the defendants (p. 34), but they both show on the contrary that plaintiff is and was at the time of the commencement of this action the owner of and entitled to the possession of all the premises described in the complaint of plaintiff herein.

III. Argument.

1. *No Adverse Possession.*

To constitute adverse possession to land in this State it must be under *claim of title exclusive of every other right*, and all taxes assessed upon the land must be paid upon the disputed premises for the period of five years under such claim of title by the party claiming adverse possession.

C. C. P., Secs. 321, 322, 323, 324, 325.

All taxes on the whole land included in the patent were paid by the Sierra Buttes Company,

from the date of the patent until 1888 (p. 48), and the defendants have failed to show in what manner the defendants paid taxes on their improvements, by producing the exhibit required of them by the agreed statement (p. 63).

It may fairly be presumed that their improvements were assessed as on land belonging to the Sierra Buttes Company, thus recognizing the title to the land. At all events, not having paid all or any taxes assessed on the land, they could not have adverse possession.

C. C. P., Sec. 325.
O'Connor vs. *Fogle*, 63 Cal., 9.
Unger vs. *Mooney*, 63 Cal., 586.
Webb vs. *Clark*, 65 Cal., 56.
Ross vs. *Evans*, 65 Cal., 439.
McNoble vs. *Justiniano*, 70 Cal., 395.
Reynolds vs. *Willard*, 80 Cal., 605.

2. *Tenancy—Admission of Title.*

The California Code expressly makes all possession of land by third parties to be *in subordination to the legal title by presumption*, unless it is shown to be adverse (C. C. P., Sec. 321); and it is a well settled rule of decision, that a tenancy arises by implication, not only in cases where rent has been paid and accepted, or possession taken by express permission of the owner, but also where possession

of another's land is taken under circumstances which do not negative, and are consistent with an implied permission or consent of the owner to the occupancy.

Gay vs. *Mitchell*, 35 Ga., 139.
Dwight vs. *Cutler*, 3 Mich., 566.
Conover vs. *Conover*, 1 N. J. Eq., 403.
Dell vs. *Gardner*, 25 Ark., 134.
Smith vs. *Houston*, 17 Ala., 111.
Haight vs. *Greer*, 19 Cal., 113.
Jackson vs. *Mowry*, 30 Ga., 143.
Logan vs. *Lewis*, 7 J. J. Marsh., 6.
Hanks vs. *Price*, 32 Gratt., 107.
Grove vs. *Barclay*, 106 Pa. St., 155.
Oakes vs. *Oakes*, 16 Ill., 106.
Keyes vs. *Hill*, 30 Vt., 759.
Church vs. *Imp. Gaslight Co.*, 6 Ad. and E., 154.

When one enters upon the land of another, by permission of the owner for an indefinite period, though without the reservation of any rent, he is by implication of law, a tenant at will.

Larned vs. *Hudson*, 60 N. Y., 104.
Doe vs. *Baker*, 4 Dev., 220.
Jones vs. *Shay*, 50 Cal., 508.

One who enters upon the land of another as a squatter, not claiming any title, and whose posses-

sion is simply acquiesced in and not objected to the owner, becomes a tenant at will of the owner, by implied consent.

Gay vs. *Mitchell*, 35 Ga., 139.
Stamper vs. *Griffin*, 20 Ga., 312.
Smith vs. *Houston*, 16 Ala., 111.
Weaver vs. *Jones*, 24 Ala., 420.

In this case the entry was not only without objection from the owner, but was made *with the understanding that there was no objection* thereto provided there was no interference with the owner's use or enjoyment of his property, and for the occupant to retain possession, *against the will of the owner*, would be a clear violation of the implied understanding and agreement, under which the entry was made, as it would interfere with the enjoyment of the absolute rights of the owner of the property; so that on principle the defendants who did not ask express permission to enter, became tenants at will of the Sierra Buttes Company, as well as those who entered by its express permission.

The learned Judge who decided the cause in the Circuit Court while admitting the well settled general principle that a tenant is estopped to deny his landlord's title (pp. 80–81), insists that the rule does not apply here because the parties acted under a mutual mistake of law as to the lessor's title, and

the parties paying rent were in possession at the time of the payment (pp. 80–81). But the learned Judge has failed to consider that these exceptions only apply *where the tenant himself claims under a title in fact paramount to that of the lessor*, and that the lessor's title is sufficiently established by a voluntary admission and recognition thereof as against a tenant *who shows no better right.*

It is the settled rule of law in this State that while an inadvertent acknowledgement of plaintiff's title by a tenant already in possession does not estop him from *showing a paramount title in himself or in a third person under whom he claims*, yet a verbal lease or recognition of plaintiff's title under a permissive tenancy is still *prima facie* and sufficient evidence of title in the landlord, unless ownership or possession under a *paramount title* is proved by the defendant, who has the burden of proof to show such title for his defense against the action of the landlord for possession.

Peralta vs. *Ginochio*, 47 Cal., 460.

Abbey Homestead Asso. vs. *Willard*, 48 Cal., 618.

In this case, there being no pretense of paramount title in the defendants, and there being no privity of title between the Government of the United States and settlers, *who are not mining*

claimants, upon lands *which are confessed to be mineral* (p. 28), and to which, therefore, no title can be acquired under the townsite act, or in any other way than by *mineral location* and payment, pursuant to the mining laws of the United States (*Defferback* vs. *Hawke*, 115 U. S., 392), it follows that the recognition by defendants of the title of the Sierra Buttes Co. is sufficient proof of that title, and plaintiff is entitled to recover possession as the undoubted assignee of that title, against all of the defendants who assumed the position of tenants at will of his vendor.

The learned Judge, in his opinion, says the plaintiff in ejectment must recover upon the strength of his own title (p. 82). True. But he appears to have overlooked the rule that the strength of plaintiff's title is made out by proof of a tenancy of the defendant under him, unless the tenant can show himself properly under the protection of a paramount title.

It is further to be considered that there is nothing in the record to indicate that there was any prior adverse possession or claim of title by any of the defendants specified as having paid rent to the Sierra Buttes Company in 1883 (p. 47), and their prior possession must be presumed to have been in subordination to the title of the patentee (Sec. 821, C.

C. P.) But the learned Judge seems to have overlooked the admitted fact that all of the remainder of the defendants *entered into possession in the first instance*, since 1883, with the express or implied permission of the Sierra Buttes Co. (p. 47), and thereby became estopped to deny its title, never having surrendered the possession received by its permission.

3. *Construction of Revised Statutes.*

The opinion of Judge Hawley sustains the contention that no patent issued since the passage of the Revised Statutes can include more than 300 feet of surface on each side of a quartz ledge, although the application and survey were made under the law of 1866, and regardless of what showing might have been made to the Land Department to sustain a larger grant under the law of 1866. He construes Sec. 2326 of the Revised Statutes as to the limitation of extent of surface claims, to be retroactive, and applicable to claims located prior to May 10th, 1872.

This position violates settled rules of construction.

"*Courts uniformly refuse to give to statutes* "*a retrospective operation*, whereby rights pre- "viously invested are injuriously affected, unless "compelled to do so by language so clear and pos-

" itive as to leave no room to doubt that such was
" the intention of the Legislature."

Chew Hong vs. *United States*, 112 U. S., 536.
Auffmordt vs. *Rasin*, 102 U. S., 620.

" Even though the words of a statute are broad
" enough in their literal extent to comprehend ex-
" isting cases, they must yet be construed as applic-
" able only to *cases that may hereafter arise*, unless
" the language employed expresses a contrary in-
" tention in unequivocal terms."

Twenty Per Cent. Cases, 20 Wall, 179–189.

The express reservation of rights accrued under former laws is decisive against the construction made by the Court.

U. S. Rev. Stat., Secs. 2328, 5597.

Sec. 2328 provides that "*applications for*
" *patents for mining claims under former laws may*
" *be prosecuted to a final decision in the General*
" *Land Office;* but in such cases where adverse
" rights are not effected thereby *patents may issue*
" *in pursuance of the provisions of this chapter;*
" and all patents for mining claims upon veins or
" lodes heretofore issued shall convey all the rights
" and privileges conferred by this chapter, where
" no adverse right existed on the 10th day of
" May, 1872."

Sec. 5597 expressly reserves all accrued rights from the operation of the repeal of the acts embraced in the revision, and provides that "all "rights and liabilities under said acts shall con- "tinue and be enforced in the same manner as if "said repeal had not been made."

4. *Collateral Attack Upon Patent.*

It is conceded that a patent for lands which have been expressly reserved by Congress, or which have been previously granted, or to the granting of which the Land Department has been given no jurisdiction whatever, is absolutely void, and may be shown to be such by a mere possessor of the land in an action of ejectment. Such are all of the cases cited and relied upon in the opinion of the learned Judge, who decided this case in the Circuit Court.

But the rule is clearly otherwise in such a case as the present where the lands confessedly belonged to the Government and were not reserved from grant, and where the Land Department has general power under the law to issue patents therefor, and to determine the qualifications of applicants, and all questions as to their compliance with conditions precedent to the grant.

The rule in such cases is that *if, upon any state*

of facts, a patent might have been lawfully issued to the patentee, his title cannot be questioned collaterally in an action at law between private parties, but the Court will presume that the proper facts existed.

Moffat vs. *U. S.*, 112 U. S., 24, 32.

If the plaintiff in error is right in the contention that a patent confirmatory of an application made under the law of 1866, is not subject to the law limiting the extent of surface locations made since May 10th, 1872, it is clear that there might be a state of facts upon which the Land Department could lawfully issue the patent in question. Indeed, all that was necessary to sustain the patent was for the Land Department to be satisfied of the truth of the allegations and proofs made before it. The application for the patent alleged to the Land Office a *full compliance with the Act of* 1866, and represented that the applicants had, *prior to that date*, occupied and improved the land applied for in accordance with the diagram of survey presented, which was alleged to be "*so extended as to conform to the rules of said mining district.*" The affidavit of Wm. Letts Oliver, filed in the Land Office, alleged possession and occupation by the Mammoth Company, as the alleged successor in interest of Thompson and McGee, of all the land

applied for, and the affidavit of R. M. Wilson showed, to the satisfaction of the Land Office, that no rules were in existence to prevent such extent of occupation, and *there having been no adverse claim to any part of the land applied for* during the period fixed by law for such claim, the Land Office evidently took the application of Thompson and McGee and the proofs before it as true, and *adjudged that the extent of surface claimed was a "reasonable quantity for the convenient working of the vein, as fixed by local rules,"* within the true intent and meaning of Sec. 4 of the Act of 1866, as appears from the granting of the certificate of purchase and patent to the Mammoth Company for all the ground claimed by Thompson and McGee and by the Mammoth Company, as their alleged successor in interest.

The allegations made in the application for the patent, that all the land applied for had been occupied in accordance with the diagram presented, and that the said diagram was "*so extended as to conform to the rules of said mining district,*" and the failure of any person to contest such allegations during the period of notice of the application, so confirmed the right of the applicants to all the land applied for, that the allegations of that petition could no longer be questioned, and the Land

Department was justified in finding them to be true, and issuing the patent as applied for. The constructive occupation under the location of the mill site, and particularly under the previous survey, which was of itself a sufficient location of the whole ground, in compliance with the general custom of miners as to the marking of boundaries, to give a constructive occupation, in the absence of local rules forbidding it (*English* vs. *Johnson*, 17 Cal., 118; *Table M. and T. Co.* vs. *Stranahan*, 20 Cal., 210, 211; Id., 21 Cal., 551; Id., 31 Cal., 387) was sufficient to sustain the allegations of the petition; but whether so or not, the action of the Land Department or its patent cannot be controlled by any counter-averment or proof of facts contrary to those which appeared in the record before it.

The Land Department having jurisdiction to grant a patent for mineral land, upon proof of a location and occupation conforming to the application in compliance with local rules, the patent issued operates to *convey the whole title of the Government*, and the issuance of the patent is a *conclusive adjudication* by the Land Department of the fact of such a location and occupation as will support the patent, and of the absolute sufficiency of the compliance by the patentee with all conditions precedent to the issuance of the patent, as

against a collateral attack in ejectment by defendants not in privity with the Government.

Aurora Hill Con. M. Co. vs. 85 *M. Co.*, 34 Fed., 515.

St. Louis Smelting Co. vs. *Green*, 4 McCrary, 232, 239.

St. Louis Smelting Co. vs. *Kemp*, 104 U. S., 636.

Steel vs. *Smelting Co.*, 106 U. S., 447.

Wright vs. *Dubois*, 21 Fed., 794.

Johnson vs. *Towsley*, 13 Wall., 83.

French vs. *Fyan*, 93 U. S., 72.

Quinby vs. *Conlan*, 104 U. S., 426.

Erhhart vs. *Hagaboom*, 115 U. S., 67.

Bagnall vs. *Broderick*, 13 Pet., 450.

Scheimer vs. *Conway*, 23 How., 235.

Hoofnagle vs. *Anderson*, 7 Wheat 212.

Cowell vs. *Lammers*, 21 Fed. Rep., 204.

Sanford vs. *Sanford*, 139 U. S., 642.

The case of *Parley's Park Silver Mining Company* vs. *Kern*, 130 U. S., 256, cited by Judge Hawley, decides that the existence and operation of local rules and customs of miners limiting the extent of a location, is a *question of fact* over which the Land Office had jurisdiction. The location in that case was made after May 10th, 1872, and was of course subject to the provisions of the law of 1872.

Whether a mining rule was in force at a given time, is a question of fact.

Harvey vs. *Ryan*, 42 Cal., 626.

We submit that the Court could not properly be turned into a Land Office, to determine what mining rules or customs, if any, were in existence at the date of the locations upon which the Mammoth patent was obtained, or whether the laws and customs of miners permitted the occupation of such surface as was taken by Thompson and McGee, or whether the quantity taken was, in fact, reasonable or otherwise; and it could not undertake to limit or control the operation of this patent upon any such grounds, especially in favor of mere intruders who have no rights under the Government.

His Honor, Judge Hawley, insists that jurisdictional facts may be inquired into, and that local mining rules limit the authority of the Land Department to issue a patent in accordance therewith. But he apparently overlooks the consideration that the Land Department itself is authorized to determine the existence and contents of local rules. Such rules can only constitute *a limitation upon the authority* of the Land Department when the Land Department itself finds that they *positively limit the extent of a surface location* to a smaller quantity than that applied for. But it found the contrary in this case, and its finding is conclusive.

The evidence before this Court shows clearly that there was no uniform rule or defined custom *positively limiting the extent of surface*, but the miners occupied what land they chose in the working of their mines. Whatever may have been the rules in 1851, in respect to which the affidavits conflict (pp. 58, 59, 60, 61), it is certain that in 1867 there was no rule or custom in force to prevent the *survey and actual location of boundaries* made prior to the application for the patent, so as to include the old millsite and timber location, and connect it with the lode, tunnels and tramway. The Government was certainly not defrauded by being paid $5 an acre for the ground applied for.

The appropriation made by the survey of 1867 must be presumed to be reasonably consistent with the local and general usage of miners in the district.

It is certain that that survey did not interfere with any rights existing at its date; nor with any location of mining ground made prior or subsequent to the date of the patent.

The decisions of the Supreme Court of California prescribing a rule for all places in the State, where there is no local rule *limiting the extent of surface*, and legitimizing a marking of surface

boundaries to any reasonable extent not inconsistent with local rules or with the general usage of miners, and not amounting to a monopoly, have the force and effect of a *local rule* applicable to each locality not otherwise providing; and a reasonable quantity of surface ground as fixed by a marking of boundaries in accordance with those decisions in a locality where no local rule limits the extent of surface occupation, is clearly a "*reasonable quantity of surface ground as fixed by local rules*," within the meaning and intent of the Act of 1866. The local rules in such case must be construed in the light of the general custom, and as qualified by it.

It does not follow that *in the absence of local rules limiting the amount of surface occupation*, there could be no grant of any surface under the Act of 1866 for want of any rule of tenure; but if neither local rules nor general custom limited extent of surface, the Land Department would have clear authority to determine, in view of all the facts, *what constituted a reasonable quantity of surface ground*, and to grant a patent accordingly, upon a showing to it that the land had been occupied as provided in the first section by an Act, which showing was made to it by the application for this patent and the affidavits filed thereunder. Its decision upon the matter is final.

Judge Hawley in his decision of this case appears further to have overlooked the well settled principle that where the authority of a tribunal depends upon facts *in pais*, its determination of the existence of facts giving it authority is conclusive.

He cites the case of *Smelting Co.* vs. *Kemp* (104 U. S., 636), as upholding the position that jurisdictional facts may be questioned. That case clearly recognizes the distinction between cases where the Land Department has power to make grants of land belonging to the government, and cases where the lands are not public property, or had been previously disposed of or reserved from sale, or the sale thereof had not been authorized by law, so that the Land Department could have no jurisdiction over the subject matter of the grant of such lands under any circumstances to any person, and affirms the rule that in the former class of cases the patent cannot be assailed collaterally in an action at law, while in the latter class of cases it may be so assailed. Yet the latter class of cases is treated as exceptional, and the Court in speaking of the exception that "if the patent be issued without authority, it may be collaterally impeached in a court of law," proceeds to say:

"This exception is *subject to the qualification that* "*when the authority depends upon the existence of*

" *particular facts, or upon the performance of cer-*
" *tain antecedent acts, and it is the duty of the Land*
" *Department to ascertain whether the facts exist or*
" *the acts have been performed, its determination is*
" *as conclusive of the existence of the authority,*
" against any collateral attack, as is its determina-
" tion upon any other matter properly submitted to
" its decision."

That case proceeds further to hold that the records of the Land Office are not admissible to impeach the validity of *a mineral patent*, or to show *that too much mineral land was granted to one applicant under the law;* that the judgment of the Land Department upon the sufficiency of the proceedings upon which the patent was issued is " *not open to contestation.* If, in issuing a patent, " its officers took *mistaken views of the law*, or *drew* " *erroneous conclusions* from the evidence, or acted " from imperfect views of their duty, or even from " corrupt motives, a court of law can afford no " remedy to a party alleging that he is thereby " aggrieved. He must resort to a court of equity, " and even there *his complaint cannot be heard*, " *unless he connect himself with the original source* " *of title*, so as to be able to aver that his rights are " injuriously affected by the existence of the patent; " and he must possess *such equities as will control* " *the legal title* in the patentee's hands."

The Court proceeds further to *presume conclusively, in support of the patent*, that the patentee *had properly acquired by purchase from proper locators, all the lands patented*, though patented in one body, to one person, who could not locate so much land, and holds that the law for the sale of mining ground, which affords an opportunity for protest during the period of notice of application for the patent, and provides for the adjudication of adverse claims, presents "*more cogent reasons in* "*cases where a patent for such ground is relied* "*upon to maintain the doctrine which we have de-* "*clared that it cannot be assailed in a collateral* "*proceeding than in the case of a patent for agri-* "*cultural land.*"

Steel vs. *Smelting Co.* (106 U. S., 452), was a case of conflict of a mineral patent with a townsite claim, and it was held that the mineral patent could not be collaterally assailed in an action of ejectment against the townsite claimants. The Court says:

"It is among the elementary principles of law, "that in actions of ejectment the legal title must "prevail. *The patent of the United States passes* "*that title.* Whoever holds it must recover against "those who have only unrealized hopes to obtain "it, or claims which it is the exclusive province of

" a court of equity to enforce. * * * That in-
" strument must first be got out of the way, or its
" enforcement enjoined before others having mere
" equitable rights can gain or hold possession of the
" land it covers."

In each of the following cases a mineral patent was sustained in an action of ejectment, as against townsite claimants, though the townsite existed at the date of the patent.

Deffeback vs. *Hauke*, 115 U. S., 392.
Sparks vs. *Pierce*, 115 U.S., 408.
St. Louis vs. *Smelting Co.*, 4 McCrary, 237–246.

In the case of *Sparks* vs. *Pierce*, the Court says:

" Here it does not appear that any effort had been made, either by the authorities of the town or by the Probate Judge of the county, or by any one else, on behalf of the occupants of the town, or by the defendants or their grantor, to acquire the legal title. The case presented, therefore, is that of occupants of the public lands *without title*, and without any attempt having been made by them, or by any one representing them, to secure that title, resisting the enforcement of the patent of the United States, on the grounds of such occupation. Mere occupation of the public lands and improvements thereon, give no vested rights

therein, as against the United States, and consequently not against any purchaser from them. To entitle a party to relief against a patent of the government, he must show a *better right to the land than the patentee*, such as in law should have been respected by the officers of the Land Department, and being respected, would have given him the patent. *It is not enough to show that the patentee ought not to have received the patent.* It must affirmatively appear that the claimant was entitled to it, and that in consequence of erroneous rulings of those officers on the facts existing, it was denied to him. *Bohall* vs. *Dilla*, 114 U. S., 51."

In the case at bar there is no ground for a pretense of any better right of the defendants to the land in controversy than that of the patentee of the Government. The rights of the applicant for the patent were determined by the requisite notice without adverse claim long before the existence of a single village lot in Johnsville. Banks could not by merely squatting on confessedly mineral land "for building and agricultural purposes" before the issuance of the mineral patent, initiate any rights whatever against the Government of the United States or its grantees of mineral land. The defendants have proved no rights under Banks, and have shown no title whatever in themselves. They have no

standing as against the grant of the Government title.

5. *Conclusion.*

It is not necessary to discuss in detail all of the specifications of error, as they are involved in the questions already discussed. If the positions taken by the plaintiff in error in the foregoing argument, either as to the proof of plaintiff's title by the tenancy of defendants, or as to the proper construction and effect of the Revised Statutes, and as to the non-assailibility in this action of the mineral patent under which plaintiff claims, is correct, it is evident that the judgment should be reversed and that judgment should be ordered to be entered in favor of the plaintiff in error, since all the facts are ascertained under stipulation of the parties as shown by the bill of exceptions (pp. 43 to 63), so that there is no occasion for a new trial. It is respectfully submitted that such is the proper determination to be made of this case.

H. L. GEAR.
Attorney for Plaintiff in Error.